Supreme Court, U.S.
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No. 84-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

v.

BENIGNO CLASS,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

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MOTION OF RESPONDENT FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF

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MOTION OF RESPONDENT FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ARGUMENT

The undersigned, a Member of the Bar of this Court, and the Attorney of Record in the above-referenced case, as successor to William E. Hellerstein, hereby moves, pursuant to this Court's Rule 35, that Respondent be granted leave to file a supplemental brief. The grounds for this motion are as follows:

1. A major issue in the instant case is whether the judgment of the New York Court of Appeals was based on adequate and independent state grounds, and is therefore unreviewable by this Court. See Brief for Respondent at 9-15, Reply Brief for Petitioner at 2-8.

2. Subsequent to the oral argument of this case, the New York Court of Appeals, on November 26, 1985, decided *People* v. *Melvin Johnson*, ___ N.Y.2d ___, ___ N.E.2d ___, ___ N.Y.S.2d ___, N.Y.L.J., December 3, 1985, at 17, col. 3.

3. The relevance of *People* v. *Johnson* to the instant case springs from footnote 3, in which the Court of Appeals cited *People* v. *Class*, the judgment under review in this Court, as a case in which the New York Court of Appeals "has excluded evidence on state constitutional grounds in the past." ___ N.Y.2d at ___, ___ N.E.2d at ___, ___ N.Y.S.2d at ___, N.Y.L.J., December 3, 1985, at 18 col. 1.

In order to notify this Court of the decision in *People* v. *Johnson*, and furnish a copy of the opinion of the Court of Appeals, counsel hereby moves for leave to file a supplemental brief.

/s/ Philip L. Weinstein
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SUPPLEMENTAL BRIEF FOR RESPONDENT

As we argued in our main brief, see Brief for Respondent at 9-15, and at oral argument, Respondent maintains that the judgment of the New York Court of Appeals in the instant case was based on adequate and independent state grounds, and is therefore unreviewable by this Court.

We file this Supplemental Brief only to note that Petitioner's argument that the Court of Appeals did not rest its decision on state law, Reply Brief for Petitioner at 2-8, is negated by the November 26, 1985, decision of the New York Court of Appeals in *People* v. *Melvin Johnson*, ___ N.Y.2d ___, ___ N.E.2d ___, ___ N.Y.S.2d, ___, N.Y.L.J., December 3, 1985, at 17, col. 3. *People* v. *Johnson* addresses the question whether New York law retains the two pronged test for determinations as to probable cause despite this Court's decision in *Illinois* v. *Gates*, 462 U.S. 213 (1983).

The relevance of *People* v. *Johnson* to the instant case springs from footnote 3 of the opinion, in which the Court of Appeals cited *People* v. *Class*, the judgment under review in this Court, as a case in which the New York Court of Appeals "has excluded evidence on state constitutional grounds in the past." ___ N.Y.2d at ___, ___ N.E.2d at ___, ___ N.Y.S.2d at ___, N.Y.L.J., December 3, 1985 at 18 col. 1.

The explicit language of the Court of Appeals in *People* v. *Johnson* confirms that the court's decision in the instant case was based on state law, and is therefore unreviewable by this Court. For the Court's convenience, a copy of the slip opinion in *People* v. *Johnson* is attached hereto as an appendix.

CONCLUSION

IN VIEW OF *PEOPLE* v. *JOHNSON*, AS WELL AS FOR THE REASONS STATED IN POINT I OF THE BRIEF FOR RESPONDENT, AND THE POINTS WE MADE AT ORAL ARGUMENT, THE WRIT SHOULD BE DISMISSED.

Respectfully submitted,

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APPENDIX

APPENDIX

State of New York
Court of Appeals

No. 574

THE PEOPLE &C.,

Respondent,

v.

MELVIN JOHNSON,

Appellant,

OPINION

This Opinion Is Uncorrected And Subject To Revision Before Publication In The New York Reports.

(574) Faith O'Neil & William E. Hellerstein, NY Legal Aid, For *Appellant*.

Mario Merola, DA, Bronx County (Anastasios Sarikas Of Counsel) For *Respondent*.

SIMONS, J.

Defendant has been convicted by a jury of felony murder and related crimes arising from the slaying of a storeowner during a robbery. The evidence against defendant included two inculpating post-arrest statements he made which he contends were improperly received in evidence because he was arrested without probable cause and the statements were products of that unlawful arrest. The arrest was unlawful, defendant contends, because the police acted solely upon hearsay information given them by a suspect named Bolivar Abreu whose information did not satisfy the reliability requirement of the *Aguilar-Spinelli* rule (*see, Aguilar* v. *Texas*, 378 US 108; *Spinelli* v. *United States*, 393 US 410). The People assert the information was reliable because it contained admissions by Abreau against

his penal interest, it was corroborated by independent investigation by the police and, failing these, because the hearsay supplied probable cause under the "totality of the circumstances" standards of *Illinois* v. *Gates* (462 US 213; *see, also, Massachusetts* v. *Upton*, ___ US ___, 80 L Ed 2d 721). We find no basis for reliability under the *Aguilar-Spinelli* rules and we decline to apply *Illinois* v. *Gates* to warrantless arrests. Inasmuch as there was no attenuation of the unlawful police conduct, the judgment must be reversed and defendant's statements suppressed.

On March 3, 1982, Raymundo Alcantara was shot and killed during the attempted robbery of his grocery store in the Bronx. Shortly thereafter, Joseph Di Prospro told officers questioning him on an unrelated charge that Bolivar Abreu was the shooter in the Alcantara homicide. This information was passed along to Detective Ernest Wieting who questioned Abreu. At first Abreu denied any knowledge of the Alcantara homicide but he subsequently implicated Di Prospro and defendant by describing a conversation he witnessed between them during which they discussed the crime. Abreu also stated that he and others traded a rifle for a .38 caliber revolver (presumably the revolver used in the crime) two months earlier and he identified other robberies committed by defendant and Di Prospro.[1] After obtaining this statement, Detective Wieting

[1] The statement in full was as follows:

"On Wednesday March 3, 1982, about 2 p.m. I was in my girls' apartment 1492 Watson 6J. Also in the apartment was Smokey (Melvin Johnson) and Joseph Di Prospro. *He (Joseph) asked me if I wanted to go in with him and Smokey in a robbery. At first I agreed but at 4:30 to 5 p.m. they left the apartment and locked me in the apartment.* Myself and Gina stayed in the apartment.

We stayed there and between 6 p.m. and 6:30 both Joseph and Smokey came in. At first Joseph came in smiling he went into the kitchen he had a black 38 cal. larger than a police service revolver. The gun had a bridge it had a brown plastic handle Beige colored tape on it—it was made in Germany on the side it had the initials 'BU'

arrested defendant and Di Prospro. At the time of the arrest, defendant had not been identified through a photo array or a line-up, and no other individuals had implicated him. The arrest was based solely on Abreu's statement.

After defendant was read his *Miranda* rights, he agreed to talk to the police, at first giving them various exculpating versions of his activities, but eventually confessing to the crime. He stated that during the robbery Di Prospro had pulled out a gun, that a struggle resulted when the proprietor grabbed for it and that during the struggle Di Prospro fired the gun at the proprietor. He repeated the confession in a later videotape statement.

Defendant moved to suppress his statements but the Suppression Court found probable cause for defendant's arrest and

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scratched into it. *About 2 months ago we traded a dude a rifle for the gun.* He emptied the shells on the floor all the six were spent.

He said numerous times that he had killed this nigger. I asked him what happened, Smokey then said, they went into a store and Joey had the gun he cocked it back and said this is a stick-up. The man had his hands in his pants pockets. Joey told him to take his hands out of his pockets. Then the man took his hands out of his pockets and grabbed the gun. The man went back and came back at him and Joey fired again and again four times in a row. Joey saw him reaching for something and Joey told Smokey to run. Smokey ran out and the man chased them out of the store. Joey fired once more and then the man started shooting and Joey fired once more. Smokey said he ran to Boynton to Watson and then to Whalen and Watson. Joey started saying that ain't the first person I shot. It was bothering him he repeated the story like Smokey said. Joey said he ran to Ward to Watson to Whalen. He came straight up to the house. *Joey said to me late that night that the cops picked him up but let him go because they didn't have anything on him.* He told me this when he came to my house he said he threw the gun down the sewer.

They also hit the bakery on Westchester. A grocery store on Evergreen and Westchester, the Spanish Restaurant. The bakery on 1 and Croes. Smokey threw the empty shells out the kitchen window." (Emphasis added.)

denied his motion. The Appellate Division affirmed without opinion. The legal issue before us is the minimum factual showing necessary to support a finding of probable cause (*see*, *People* v. *Bigelow*, ____ NY2d ____, dec. herewith; *People* v. *McRay*, 51 NY2d 594, 601; *cf. People* v. *Wharton*, 46 NY2d 924, 925; *cert denied* 444 US 800).

A police officer may arrest a person without a warrant when he has probable cause to believe that such person has committed a crime.[2] Probable cause may be supplied, in whole or part, through hearsay information (*see*, *People* v. *Landy*, 59 NY2d 369, 375; *People* v. *Rodriguez*, 52 NY2d 483, 488-489; *People* v. *Hanlon*, 36 NY2d 549, 556, *supra*), but before probable cause based on hearsay is found it must appear, in the language of the *Aguilar-Spinelli* rules, that the informant has some basis of knowledge for the information he transmitted to the police and that the information is reliable (*People* v. *Landy*, *supra*, 375; *People* v. *Rodriguez*, *supra*, 488-489; *People* v. *Hanlon*, *supra*, 558; *cf. Illinois* v. *Gates*, 462 US 213, *supra*). The basis of the informant's knowledge must be demonstrated because his information, whether reliable or not, is of little probative value if he does not have knowledge of the events he describes (*People* v. *Rodriguez*, *supra*, p 491). Conversely, no matter how solid his basis of knowledge, the information will not support a finding of probable cause unless it is reliable. Since police officers may not arrest a person on mere suspicion or rumor, they likewise may not arrest a suspect on the basis of

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[2] The statute uses the words "reasonable cause" (*see*, CPL 140.10). There is at least a technical distinction in the necessary quantum of underlying evidence between an arrest made with reasonable cause (which is usually equated with probable cause) to believe that defendant has committed a crime and a search based upon probable cause to believe that contraband will be found in a certain place (*see*, *People* v. *Lombardi*, 18 AD2d 177, 180, *affd* 13 NY2d 1014; *and see*, *generally*, 1 LaFave, Searches and Seizures § 3.1 *et seq.* [1978]). For purposes of this appeal, however, the inquiry is the same because both deal with probable cause.

an informant's tip, perhaps born of suspicion or rumor or intentional fabrication. Abreu's statement was based upon personal knowledge and thus on this appeal we are concerned solely with his reliability.

When the courts talk about the informant's reliability, they are usually talking about his "track record", his past performance as a supplier of information (*see*, *People* v. *Rodriguez*, 52 NY2d 485). Another obvious form of verification would be an oath (*see*, *People* v. *Wheatman*, 29 NY2d 337, 345-346, *cert den sub nom Marcus* v. *New York*, 409 US 1027, reh *denied* 409 US 119) or an admission against penal interest which serves the function of an oath (*see*, *People* v. *Comforto*, 62 NY2d 725; *United States* v. *Harris*, 403 US 573). The informant's veracity may also be established by other means showing the reliability of the information itself (*see*, *People* v. *Comforto*, *supra*, 727; *see*, *generally*, *Roe*, *Illinois* v. *Gates: Restructuring Hearsay Analysis in Probable Cause Determinations*, 35 Syracuse L Rev 1067, 1078-1086 [1984]). In the present case, the record does not contain anything to substantiate Abreu's past performance as an informant and his statement was not given under oath. The People urge, however, that reliability was established either by the admissions against penal interest found in his statement (*see*, *People* v. *Comforto*, *supra*; *People* v. *Wheatman*, *supra*), or by police investigation which corroborated the details of his statement (*see*, *People* v. *Elwell*, 50 NY2d 231, 237; *People* v. *Alaimo*, 34 NY2d 187).

Statements against penal interest are admissible at trial as exceptions to the hearsay rule because the declarant's interest against being criminally implicated gives reasonable assurance of the reliability of his statement (*see*, *People* v. *Maerling*, 46 NY2d 289, 295-298; *People* v. *Brown*, 26 NY2d 88; *People* v. *Egan*, 78 AD2d 34, 36-37). This general assurance of reliability also has been deemed sufficient when assessing hearsay information necessary to support probable cause determinations (*see*, *People* v. *Comforto*, *supra*; *United States* v. *Harris*, 403 US 573, *supra*; *see*, *generally*, LaFave, *supra*, § 3.3[c]). Such admissions are not guarantees of truthfulness and they should

be accepted only after careful consideration of all the relevant circumstances of the case indicates that there exists a basis for finding reliability. Nevertheless, admissions against penal interest have been held sufficient to support a finding of probable cause even though the informant has little to lose and much to gain by supplying information to the police in which he incriminates himself (*see*, *People* v. *Comforto*, *supra*; *People* v. *Rodriguez*, 52 NY2d 483, 490), or though his admissions incriminate him of criminal conduct less serious than the crime under investigation (*see*, *People* v. *Comforto*, *supra*; *United States* v. *Harris*, *supra*). The reason they are accepted is that the informant's identity is known to the police and they may use his statement admitting criminal conduct against him if his information is false (*see*, LaFave, Search and Seizure § 3.3[c], pp 525-534). The inculpating admissions thus serve the same purpose as a false statement under oath by placing the informant in jeopardy if he attempts to deceive or mislead the police.

In this case the People contend that Abreu's statement contains admissions of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]) and Criminal Facilitation in the Fourth Degree (Penal Law § 115.00[1]). Manifestly, Abreu did not admit possession of the revolver in his statement and, to support their position, the People claim that trial evidence of possession incriminated him. That is not sufficient, however, because the trial evidence was not known to Detective Weiting at the time of defendant's arrest and thus it could not provide him with any assurance at that time that Abreu was telling the truth. Nor do the People fare any better with their claim of facilitation. A person is guilty of criminal facilitation when, believing it probable that he is rendering aid to a person intending to commit a crime, he "engages in conduct which provides such person with the means or opportunity" to commit the crime and which in fact "aids such person to commit the crime" (Penal Law § 115.00[1]). Facilitation requires assistance to a person who intends to commit the crime at the time aid is given and who subsequently commits it (*People* v. *Gordon*, 32

NY2d 62, 64-65). To establish facilitation, the People rely on Abreu's conduct in assisting others to trade a rifle for the revolver used to kill Alcantara. That conduct occurred two months before the present crime was planned or occurred. Neither it, nor the other crimes mentioned in the statement, could support a charge of facilitation because nothing indicates that at the time Abreu and the others procured the revolver defendant and Di Prospro intended to rob Alcantara's store or the other businesses mentioned in Abreu's statement, or that Abreu knew they intended to use the revolver for those robberies.

Nor was the information corroborated by independent police investigation. In his statement Abreu had asserted that Di Prospro told him that Di Prospro had been picked up by the police earlier but they had released him because "they did not have anything on him." That was true, to the knowledge of the police, but it hardly constituted corroboration sufficient to establish the reliablity of the rest of Abreu's statement as the People contend (*see*, *People* v. *Wirchansky*, 41 NY2d 130 and *compare People* v. *Alaimo*, 34 NY2d 187).

Thus, if probable cause is to be found in this case it must be based upon the test recently announced by the Supreme Court in *Illinois* v. *Gates* (462 US 213, *supra*).

In the *Gates* case, the police conducted an authorized search of defendant's home and car which produced evidence supporting convictions on drug charges. The papers submitted to the magistrate to support the warrant application relied on a detailed anonymous letter alleging the defendants were engaged in drug trafficking. That information was subsequently corroborated in part by the investigation of the police. Although the letter failed to demonstrate the informant's basis of knowledge, the Supreme Court upheld the magistrate's determinations of probable cause. In doing so, the court abandoned the *Aguilar-Spinelli* test in favor of a new "totality of the circumstances" analysis for reviewing probable cause determinations. Under the *Gates* rule, the familiar two-prong test no

longer need be satisfied. Basis of knowledge and reliability are not essential findings in a probable cause determination but, rather, only relevant considerations. It is sufficient that the issuing magistrate makes a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him including reliability and basis of knowledge, there is a fair probability" that the evidence sought will be located in the place in which the warrant authorizes the search. The duty of an appellate court, reviewing a magistrate's determination, is to do no more than insure that there was a substantial basis for the magistrate's conclusion that probable cause existed (*Illinois* v. *Gates*, 462 US 213, *supra*, at 238). Thus, under the *Gates* formulation, not only is the legal conclusion of probable cause to be made in a "practical common-sense" way but also a subjective standard of trustworthiness is to be used, free of fixed rules, to determine the factual predicate on which the magistrate's legal conclusion rests.

Gates involved a search warrant and the court's reasoning relies heavily on the fact that the determination of probable cause was made by a detached and neutral magistrate. Thus, a large part of the court's justification for adopting the new rule rests upon its view that, in assessing probable cause, the appellate courts prefer determinations made by a magistrate issuing a warrant over those based upon the "hurried judgment" of law enforcement officers engaged in investigating crime (*Illinois* v. *Gates*, 462 US 213, supra, at 235-236), a preference this Court has also expressed (*see*, *People* v. *Elwell*, 50 NY2d 231, 241-242, *supra; People* v. *Hanlon*, 36 NY2d 549, 558-559). The importance of that consideration was emphasized by the language of the Supreme Court opinion which reaffirmed prior decisions stating that the use of warrants should be encouraged, by several statements that reviewing courts should accord great deference to the magistrate's determination of probable cause (462 US 213, *supra*, at 230-232, 239), and by references to the protections afforded by limitations on a magistrate's power to approve a warrant (*id.* 239). Noting that warrant applications are commonly drafted by

non-lawyers who should not be hobbled by technical rules (*id.* 236), the court stated that applications are to be interpreted in a common-sense, not a hypertechnical manner. Finally, the court noted that warrants were to be encouraged because the use of search warrants greatly reduces the perception of unlawful or intrusive police conduct by insuring the person whose property is being searched or seized of the lawful authority of the executing officer and the limits of his power (*id.* 236).

These several arguments suggest that the rule may not apply to situations involving warrantless arrests and searches and, as a matter of State constitutional law, we decline to so apply it. In so holding, we note that this Court has repeatedly stated that the proscription against unlawful searches and seizures contained in section 12 of article I of the New York State Constitution conforms with that found in the Fourth Amendment, and that this identity of language suppports a policy of uniformity between State and Federal courts. Thus, in the past, we have chosen to fashion our rules to promote consistency in the interpretation we have given to the two clauses (*see, e.g., People* v. *Gonzalez*, 62 NY2d 386, 389-390; *People* v. *Ponder*, 54 NY2d 160, 165; *People* v. *Roman*, 53 NY2d 39, 41-42). The practical considerations upon which uniformity rests must yield, however, to a predictable, structured analysis of the quality of evidence necessary to support intrusive searches and seizures. Certainly, when the Supreme Court has not addressed a specific issue or provided guidance for such an analysis in its Fourth Amendment rulings, we may, as we have in the past, choose to judge the lawfulness of the police conduct by the standards of our state constitution (*see, e.g., People* v. *Gokey*, 60 NY2d 309; *People* v. *Elwell*, *supra*; *People* v. *Belton*, 55 NY2d 49). This appeal presents one of those situations in which we believe that the aims of predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens are best promoted by applying state constitutional standards. In doing so we also

provide "bright line" guidance to police personnel in performing their duties (*see*, *People* v. *Belton*, 55 NY2d 49, 55, *supra*).

As a result of defendant's illegal arrest, the prosecution obtained two statements from him which were introduced at trial; the first, a written statement made about an hour and a half after his arrest and the second, a videotaped statement made four and a half hours after arrest. The burden rested upon the People to demonstrate that the statements were not acquired by exploitation of the arrest but by means sufficiently distinguishable from it to be purged of illegality (*see*, *generally*, *People* v. *Martinez*, 37 NY2d 662). The relevant considerations for determining that were whether some intervening event broke the causal connection between defendant's arrest and the making of the statements, specifically "the temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct" (*Brown* v. *Illinois*, 422 US 590, 603-604; *see*, *also*, *Dunaway* v. *New York*, 442 US 200; *Taylor* v. *Alabama*, 457 US 687).

This case is virtually identical to *Dunaway* and *Taylor*. In *Dunaway*, the defendant made a statement within an hour of his arrival at the police station and in *Taylor*, defendant made a statement six hours after his arrest. There was no intervening events in either case to break the causal connection between the arrests and the statements. In this case, the elapsed time was one and one-half and four and one-half hours between arrest and statement. The People do not contend that anything happened to attenuate the taint of the illegal arrest; rather, they base their entire case on the claim that the arrest was legal. We hold otherwise.

Accordingly, the order should be reversed, motion to suppress granted and the case remitted to Supreme Court, Bronx County for further proceedings on the indictment.[3]

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[3] Insofar as the concurring judges contend that exclusion is a common law rule rather than a constitutional doctrine under New York law, we would but add that, notwithstanding the history they recite, the Court has excluded evidence on state constitutional grounds in the past (*see, e.g., People* v. *Class*, 63 NY2d 491; *People* v. *Gokey*,60 NY2d 309; *People* v. *Elwell*, 50 NY2d 231). Indeed, one of the concurring judges, contrary to the position he now advances, has previously voted to suppress evidence admissible under the Fourth Amendment on state constitutional grounds (*see, People* v. *Gokey, supra*).

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Titone, J. (concurring)

I agree with the majority that there should be a reversal, but cannot join its opinion which establishes an exclusionary rule under our State Constitution, thus amending the constitution in a fashion explicitly rejected by the delegates to the 1983 Constitutional Convention, and overruling three decisions *sub silentio* (*People* v. *Richter's Jewelers, Inc.*, 291 NY 161 [Lehman, Ch. J.]; *People* v. *Defore*, 242 NY 13 [Cardozo, Ch. J.], *cert. denied* 270 US 657; *People* v. *Adams*, 276 NY 351, *affd* 192 US 585). As shall be demonstrated, exclusion of evidence is not a command of Article I, section 12, of the State Constitution. Rather, it is a judicially declared rule of evidence which the legislature is free to abrogate.

The question of whether evidence obtained in a lawless fashion should be inadmissible was first addressed by us in *People* v. *Adams* (*supra*). In accordance with the then settled common law rule, we held that "the matter in which the witnesses became possessed of the evidendce is a matter of no importance" (*People* v. *Adams*, *supra*, p 359).

Following the Supreme Court's adoption of an exclusionary rule in federal prosecutions (*Weeks* v. *United States*, 232 US 383), then Chief Judge Cardozo reexamined the subject in *People* v. *DeFore* (242 NY 13, *supra*), the seminal opinion in the nation (*see* 7 Wigmore, Evidence, §§ 2183, § 21184a [McNaughton rev 1961]). In his ever eloquent style, Cardozo explained why the common law rule adopted in *Adams* remained sound, and that the "Legislature * * * has acquiesced in the ruling of this Court that the prohibition of the search did not anathematize the evidence yielded through the search * * *. We must hold it to be the law until those organs of government by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass" (*People* v. *Defore*, *supra*, p 25).

In subsequent years, none of the "organs of government" acted favorably on any proposal to depart from *Defore* (*see*, *Sackler* v. *Sackler*, 15 NY2d 40, 42). More important, the Revised Record of the New York State Constitutional Convention of 1938, at which Article I, Section 12, of the State Constitution prohibiting unreasonable searches and seizures was adopted, contains unequivocal authority for the proposition that the exclusionary rule does not exist as a constitutional remedy.

Two major proposals were considered relating to unreasonable searches and seizures at the 1938 Constitutional Convention. The first, introduced by Senator Dunnigan, contained a prohibition against the use of evidence unlawfully obtained.[1] The second proposal, introduced by the Bill of Rights Committee, contained no such prohibitory clause and reflected Civil Rights Law section 8. The merit of each proposal was debated at great length (Revised Record of the New York State Constitutional Convention of 1938, Vol. I, pp 406-594). The Dunnigan proposal, which would have established a constitutional bar against unreasonable searches and seizures, coupled with an exclusionary rule, was sharply criticized by a number of the delegates.

Chief Judge Cardozo's view that adoption of an exclusionary rule was a task for the political branches of government was reiterated by delegate H.E. Lewis, who aptly stated:

> "It is interesting to note that although in the *Defore* case Judge Cardozo said if there is to be any change making the use of evidence illegally obtained inadmissible, it should be by legislative fiat, and even though that decision is twelve years old no Legislature—and during that time Senator Dunnigan has been there all those years, I think he said—no legislature has ever dared suggest the prohibition of the

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[1] The Dunnigan proposal provided, in part, "Evidence obtained in violation of this section shall not be received in any hearing, trial or proceeding." (Record, Vol 1, at pp 406-407.)

use of evidence where it involves incriminating acts." (Record at p 426.)

In addition, the relative permanence of the constitutional change contemplated by the Dunnigan proposal was not overlooked. As noted by delegate Reigelman:

> "Mr. President, this is not a statute we are considering. A statute can be quickly repealed if we make a mistake. It is the Constitution, a basic and presumably permanent document, and one that cannot be readily changed. We are asked to write into that document the principle not merely that certain rights shall not be invaded, not only that the law-enforcement officer who invades those rights may be subject to punishment, but that the victim of the invasion, however vicious, however brutal, however dangerous to society he may be, and however atrocious his offense, might have the additional compensation and benefit of going free. To do otherwise, we are told, is to place the State in the indefensible position of taking advantage of its own wrong. I think that that is a sheer sophistry. It is based, in my opinion, upon an obvious confusion of thought." (Record, at p 416.)

Subsequent to the lengthy debate, and after citation to Cardozo, Holmes and Wigmore, the proposal of the Bill of Rights Committee, which lacked the prohibitory clause, was advanced by the Committee of the Whole. By a vote of 90 (aye) to 69 (no), the delegates approved the proposal of the Bill of Rights Committee, and it was subsequently fully indorsed. Thus, the Convention rejected the Dunnigan proposal, which contained a provision mandating the exclusion of evidence, incorporated Civil Rights Law section 8 into the State Constitution, and retained the *Defore* rationale.

Nonetheless, in 1943 argument was made to this Court that the mere inclusion of a bar against unreasonable searches and seizures in the State Constitution compelled the adoption of an exclusionary rule (*People* v. *Richter's Jewelers*, 291 NY 161, *supra*). Chief Judge Lehman explained that the *Defore* rule remained unchanged and that it was beyond the power of this Court to adopt the rule by decisional law. His cogent analysis

cannot be improved upon and states my position precisely and concisely (*id.* at 168-169):

> "Since that decision [*People* v. *Defore*, *supra*], no 'organ of government' has given notice to the courts that the change has come to pass. True, the immunity from unreasonable search and seizure is no longer a creature of statute, for in 1938 the statute was incorporated in the Constitution. The language remains the same as the language of the Civil Rights Law when this court defined its scope in *People* v. *Defore (supra)* and is the same as the language of the Federal Constitution. Doubtless if the effect of that language had not been previously determined authoritatively by this court and if the Legislature had not for almost forty years acquiesced in that ruling, argument might be made that ordinarily the same language in the Constitution of the State of New York and in the Constitution of the United States should be given the same effect and that a sound public policy dictates the conclusion that the constitutional right of immunity of the individual from unreasonable search and seizure should be implemented by rejection of evidence obtained by public officers in violation of the rights of the individual. Even now the Legislature may, if it chooses, give heed to such arguments. This court cannot properly do so.
>
> "The framers of the new section of the Constitution were fully informed that in this State the rule was firmly established by old decisions that rejection of evidence obtained by a public officer through unreasonable search and seizure is not the legal consequence of the officer's trespass. Certainly it cannot be said that the incorporation of the statutory prohibition into the Constitution without change of language was intended to change the scope and effect of the prohibition in a matter of grave importance about which much controversy had raged and is still raging. The intention to leave the rule unchanged is clear even without resort to the proceedings of the convention, and examination of those proceedings merely confirms that conclusion. There is room for discussion whether the convention acted wisely in rejecting proposals to change the New York rule formulated in *People* v. *Defore*. There is hardly room for discussion that the convention decided that no change in the rule should be made by it, leaving the Legislature free, as it had been before, to determine

whether and in what circumstances evidence obtained by trespass should be rejected."

It thus cannot be urged that an exclusionary rule was engrafted upon Article I, section 12, by implication or otherwise.

In 1961, the Supreme Court, overruling prior precedent (*Wolf* v. *Colorado*, 338 US 25), held in *Mapp* v. *Ohio* (367 US 643), that evidence obtained in violation of the Fourth Amendment, made applicable to the states through the due process clause, was inadmissible in a state criminal prosecution. We followed *Mapp* on constraint, observing that *People* v. *Richter's Jewelers (supra)*, *People* v. *Defore (supra)* and *People* v. *Adams* (supra) otherwise remained authoritative (*see*, *People* v. *Loria*, 10 NY2d 368, 370). In *Sackler* v. *Sackler* (15 NY2d 40, 42, *supra*), Chief Judge Desmond remarked that the State rule had not otherwise been changed: "Nowhere, as all admit, is there any constitutional, statutory or decisional authority for rejecting otherwise valid evidence on * * * [the] ground [of illegal entry]. Our State's prohibition against unreasonable search and seizures (NY Const, art I, § 12; Civil Rights Law § 8) do not have that purpose or effect." (*See, also*, *People* v. *Horman*, 22 NY2d 378, 381, *cert denied* 393 US 1057; Richardson on Evidence, §§ 558, 560 [10th ed].) Further, as has the Supreme Court (*United States* v. *Caladrea*, 414 US 338, 347), we have rejected the notion that the exclusionary rule operates as some sort of personal constitutional right of the party aggrieved, embracing, instead, the Supreme Court's concept that the exclusionary rule is a judicially created remedy designed to protect privacy values generally through its deterrent effect (*People* v. *Young*, 55 NY2d 419, 425; *People* v. *Adams*, 53 NY2d 1, 9 *cert. denied* 454 US 854; *People* v. *McGrath;* 46 NY2d 12, 21, *cert denied* 440 US 972).

Recently, the pendulum has swung: the Supreme Court has tended to read its prior decisions interpreting the Fourth Amendment narrowly. This Court has generally followed a policy of uniformity so that police officers and lower courts will have the benefit of a clear bright-line rule (*e.g. People* v.

Gonzalez, 62 NY2d 386, 389-390; *People* v. *Ponder*, 54 NY2d 160). As we put it in *People* v. *Ponder* (*supra*, p 165), "section 12 of article I of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts."

In a few cases, however, this Court has declined to read the Fourth Amendment and article I, § 12, of the State Constitution as coextensive and has suppressed evidence on state grounds (*see, e.g. People* v. *Gokey*, 60 NY2d 309; *People* v. *Elwell*, 50 NY2d 231). But not one of these cases purports to overrule *People* v. *Richter's Jewelers* (291 NY 161, *supra*), *People* v. *Defore* (242 NY 13, *supra*) or *People* v. *Adams* (176 NY 351, *supra*) and they are inconsistent with the analysis in *People* v. *Gonzalez* (62 NY2d 386, 389-390, *supra*), a subsequent decision. It appears that the question of whether an exclusionary rule is supported by article I, § 12, of the State Constitution,[2] was not raised by the parties and in fact it has not been raised here. Whether the exclusionary sanction implicitly adopted is constitutionally based, or a product of a "judicially declared rule of evidence" (*People* v. *Cahan*, 44 Cal2d 434, 442, 282 P2d 905, 910 [Traynor, J.]) which the legislature is free to abrogate, was not discussed.

From a purely *stare decisis* viewpoint, these are "odd cases" which should now be rejected (*People* v. *Hobson*, 39 NY2d 479, 487). As former Chief Judge Breitel put it, "*Stare decisis*, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the patricide receiving mercy because he is an orphan. The

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[2] Our right to counsel decisions are, of course, not on point. Those decisions rest upon a different section of the State Constitution (NY Const, art I, § 6), with a different historical backdrop "independent of its Federal counterpart" (*People* v. *Settles*, 46 NY2d 154, 161).

odd case rode roughshod over *star decisis* as their legitimate right, whether or not they express sound, good or acceptable doctrine" (*People* v. *Hobson*, *supra*, p. 487).

In England, where the entire doctrine of *stare decisis* originated with the birth of the common law, it is basic "that where material cases * * * which show that a court has decided a case wrongly were not brought to its attention the court is not bound by that decision in a subsequent case" (*Nicholas* v. *Penny* [1950] 2 KB 466, 473; *see also*, *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] KB 718). The same principle has been followed by this Court (*e.g. Rowland* v. *Mayor*, 83 NY 372, 377 ["the point now presented, * * * (was not a) matter of argument or in any way involved in the (subsequent) decisions"]; *cf. People* v. *Hobson*, 39 NY2d 479, *supra*) and other American courts (*e.g. Chapman* v. *Dorsey*, 230 Minn 279, 41 NW2d 438, 443; *State* v. *Mellenberger*, 163 Ore 233 95 P2d 709, 719; *see*, Comment, Stare Decisis in Courts of Last Resort, 37 Harv L Rev 409).

More important, the doctrine of *stare decisis* cannot be invoked to sustain a decision which is in conflict with the State Constitution. Our analysis in *Board of Educ. of Cent. School Dist. No. 1* v. *Allen* (20 NY2d 109, 117, *affd* 392 US 236) is squarely on point: "We cannot perpetuate an erroneous interpretation of the State Constitution merely because it is contained in the reports of this court."

This does not, however, end the matter. Although, as has been shown, our State Constitution does not support an exclusionary rule, decisions like *People* v. *Gorkey, (supra)* might well be explained on the ground that the challenged search and seizure was *substantially* unreasonable, but *procedurally* exclusion is required as a judge made common law rule of evidence (*see*, *Coolidge* v. *New Hampshire*, 403 US 443, 493, 498 [Black, J., concurring]; *People* v. *Cahan*, 44 Cal2d 434, 442, 282 P2d 905, 910 *supra*), and if the legislature were to negate that judge made rule, as it is unquestionably empowered to do, and declare that henceforth courts in this State may not

exclude evidence seized in violation of the State Constitution unless exclusion be required by the federal constitution, the search would still be illegal and might support a tort action, but we would be compelled to honor the legislative judgment (*see, In re Lance W.*, 37 Cal3d 873, 888, 694 P2d 744, 752; *State* v. *Larazzoli*, 434 So2d 321, 323 [Fla]). This approach is consistent with that recommended in a leading evidentiary text: "An extensive literature has built up concerning rights under state law that may be enforceable by means of an exclusionary sanction. * * * Most of this discussion, however, fails to distinguish between developments of rights under state law, on the one hand, and the development of an exclusionary sanction to remedy violations of these rights, on the other" (McCormick, Evidence [3d ed], § 166, p 449 n. 1).[3]

To be sure, the approach also has its drawbacks. It certainly seems inconsistent with the public policy expressed in *People* v. *Richter's Jewelers (supra)* and *People* v. *Defore (supra)* of deferring to the legislative branch in the first instance. But given what some might perceive to be a change in public policy, arguable legislative acquiesence, and the ability of the legislature to overturn such a judge made rule, it seems like the most preferable course (*see*, Stewart, The Road to Mapp v Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum L Rev 1365, 1396-1399). After all, the common law of evidence is constantly being refashioned to meet the demands of modern societal expectations (*cf. Fleury* v. *Edwards*, 14 NY2d 334, 341). Certainly, that approach is better than creating a constitutional precedent, which will be a non-precedent, based as it is on an erroneous interpretation of the State Constitution (*see*,

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[3] I note with interest that the gap in jurisprudential analysis is not limited to New York (*compare, e.g. State* v. *Alston*, 88 NJ 211, 440 A2d 1311 and *State* v. *Johnson*, 68 NJ 349, 346 A2d 66 *with State* v. *Smith*, 37 NJ 481, 181 A2d 761 and *Eleuteri* v. *Richman*, 26 NJ 506, 511, 141 A2d 46, 49).

Board of Educ. of Cent. School Dist. No. 1 v. *Allen*, 20 NY2d 109, 117, *supra*).[4]

On the merits, I note that the Supreme Court has not yet passed on whether *Illinois* v. *Gates* (462 US 213) and *United States* v. *Leon* (___ US ___, 104 S Ct 3405) will apply to warrantless seizures, though the issue is apparently presented by *California* v. *Ciraolo* (No. 84-1513, ___ US ___, 105 S Ct 2672, *granting cert* to 161 Cal App 3d 1081, 208 Cal Rptr 93) (*see, generally*, Kasmisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L Rev 551, 581-584), and it has been the custom of this court to decide unsettled questions of constitutional law upon federal grounds, and to accorder broader rights to an accused only after the Supreme Court has declined to do so. I would continue to follow that policy.

Our decisions nevertheless do provide ample support for the result reached today. We have emphasized that an assessment of probable cause turns on what was reasonably and objectively, in the mind of law enforcement authorities (*People* v. *Jennings*, 54 NY2d 518, 523; *People* v. *Adams*, 53 NY2d 1, 9,

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[4] Parenthetically, it is not at all clear that our decision is insulated from United States Supreme Court review. The message eminating from *Michigan* v. *Long* (463 US 1032) and Chief Justice Burger's concurring opinion in *Florida* v. *Cassal* (462 US 637) is that the rights of the People may not be defeated on independent state grounds where the voters of the state have explicitly precluded their courts from adopting an exclusionary rule broader than that required by the federal constitution (*cf. Parrot* v. *City of Tallahassee*, 381 US 429; *NAACP* v. *Alabama ex rel. Patterson*, 357 US 449; *Staub* v. *City of Baxley*, 355 US 313; Hill, The Inadequate State Ground, 65 Colum L Rev 1251), as demonstrated by the grant of certiorari in *New York* v. *Class* (___ US ___, 105 S Ct 1863, 63 NY2d 491), a case the majority states was decided purely on State Constitutional grounds. This case is of moment because the court finds a *Dunaway* v. *New York* (462 US 200) violation and, ironically, the Supreme Court's reversal made that rule binding on us. We had declined to adopt the *Dunaway* rule as a matter of federal or state law.

cert denied 454 US 854). The "good faith" exception to the exclusionary rule is not applicable simple because the officer has a "'white heart and empty head'" (*People* v. *Jennings*, *supra*, p 523), and in this case application of the exclusionary rule would deter "gut hunch" warrantless arrests (*cf. People* v. *Adams*, *supra*), though, at least arguably, a different result should obtain if a warrant be obtained in accordance with our preference for warrants (*see*, *e.g. People* v. *Hanlon*, 36 NY2d 549).

Here, the only evidence leading to defendant's arrest was the statement of an individual with no history of giving reliable information to the police and who exculpated himself from a homicide charge by implicating the defendant in the crime. There being no exigency, the police should have applied for a warrant, placing the informant under oath (*see*, *People* v. *Cantre*, 65 NY2d 790; *People* v. *Hicks*, 38 NY2d 90) or, at least, producing him before a magistrate (*People* v. *Brown* 40 NY2d 183). Because the officers did not do so, suppression is appropriate under the judicially formulated rule of exclusion.

For these reasons, I concur in the reversal, but not the majority opinion.

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Order reversed, motion to suppress granted and case remitted to Supreme Court, Bronx County, for further proceedings on the indictment. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Meyer, Kaye and Alexander concur. Judge Titone concurs in result in a separate opinion in which Judge Jasen concurs.

Decided November 26, 1985

State of New York)
) ss.:
County of New York)

MARK C. COGAN, an attorney duly admitted to the practice before the courts of this State, being duly sworn, hereby states under penalty of perjury:

That on December 3, the within Motion and Supplemental Brief was served upon The Honorable Mario Merola, District Attorney, Bronx County, 215 East 161st Street, Bronx, New York 10451, the address designated by him for that purpose, by depositing a true copy of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: New York, New York
December 3, 1985

/s/ MARK C. COGAN
Mark C. Cogan

Sworn to before me this
day of December 3, 1985

/s/ _____
NOTARY PUBLIC
King County
Reg. No. 4810465
Expires 3/30/86